Supreme Court, U.S.
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No. 99-8576

IN THE

Supreme Court of the United States

PAUL L. GLOVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant must demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), for establishing ineffective assistance of counsel.

2. Whether a 2-level error in the offense level under the sentencing guidelines, resulting in the petitioner's being erroneously sentenced to an additional 6 to 21 months in prison on account of his lawyer's error, was insufficient to satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

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OPINIONS BELOW

The opinion of the court of appeals was reported at 182 F.3d 921 (7th Cir. 1999) (table) and is reproduced in the Joint Appendix at J.A. 52. The opinion of the United States District Court for the Northern District of Illinois was not published and is reproduced in the Joint Appendix at J.A. 42.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A timely petition for rehearing was denied on October 7, 1999. (J.A. 55). The petition for certiorari was filed on March 6, 2000, and was granted on June 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The relevant constitutional provision is the Sixth Amendment to the United States Constitution, which provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

1. Conviction and Sentencing

On June 22, 1995, petitioner Paul Glover was found guilty by a federal jury of one count of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d); eleven counts of soliciting and receiving kickbacks in violation of 18 U.S.C. § 1954; two counts of money laundering

in violation of 18 U.S.C. § 1956(a)(1)(B)(I); and four counts of tax evasion in violation of 26 U.S.C. § 7206. (J.A. 42). His conviction arose out of his conduct in connection with a series of investments made with money from the pension and health and welfare funds of the Chicago Truck Drivers, Helpers and Warehouse Workers Union, where Mr. Glover was employed as Vice President and General Counsel.

In the Preliminary Presentence Investigation Report ("PPSI"), the United States Probation Office recommended grouping the money laundering and kickback counts pursuant to Sentencing Guidelines § 3D1.2. (J.A. 70-71). The United States filed a position paper objecting to the PPSI, including as its first argument that the money laundering and kickback offenses should not be grouped together under USSG § 3D1.2 and that Glover therefore should receive a two-level multiple count adjustment under USSG § 3D1.4. Mr. Glover's counsel filed no written response. At the sentencing hearing, the court asked petitioner's counsel to address the government's objections to the grouping of offenses. In response, counsel simply stated a few sentences reflecting his belief that "I just think [the grouping] appropriate," without any case citations or detailed reasoning. (J.A. 89). The trial court ruled for the government and ordered that the money laundering and kickback offenses be treated separately. Based on this decision, the court added two levels to Glover's offense level. (J.A. 85). The trial court then determined that Mr. Glover's total offense level was 28 and his criminal history category was level I, resulting in a guideline range of 78 to 97 months. Petitioner was sentenced to 84 months' incarceration. (J.A. 93).

Mr. Glover appealed and was represented by the same counsel who represented him at trial and sentencing. On appeal, his counsel raised two issues: (i) that the trial judge had improperly admitted certain testimony into evidence; and (ii) that the trial judge had improperly increased his offense level based on a finding that Glover had perjured himself. Counsel did not

challenge at any time during the appeal the trial court's refusal to group together the money laundering and kickback offenses. The conviction and sentence were affirmed by the Seventh Circuit in an opinion filed December 2, 1996. (J.A. 129). Mr. Glover's counsel did not seek certiorari from this Court.

2. Section 2255 Action

On November 26, 1997, Mr. Glover filed his present action to correct his sentence in the U.S. District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 2255. He asserted that section 2255 relief should be granted because his former counsel was ineffective in failing to assert or pursue the grouping issue concerning his money laundering and kickback offenses. Glover's petition alleged that by failing to prepare a written response to the government's objections to the PPSI and by failing to present an oral argument at the sentencing hearing, counsel had been ineffective at the trial level in not setting forth the arguments and case law supporting the PPSI position.

Glover's petition also alleged that he received ineffective assistance of counsel on appeal because his counsel never at any time raised the grouping issue in the appellate court. Mr. Glover noted that, along with other case law calling into question the trial court's ruling on the grouping issue, the Seventh Circuit decision in *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), had held that money laundering offenses and mail fraud offenses should be grouped together in cases like his. The *Wilson* case was issued on October 17, 1996, while Mr. Glover's appeal was still pending before the court of appeals. (J.A. 129).

In his Section 2255 motion, Mr. Glover claimed that his counsel's ineffective assistance during sentencing and appeal had caused Glover to receive an incorrect sentence. As a result of counsel's alleged ineffectiveness, Glover's sentencing range was increased by two levels due to the separate treatment of the money laundering and kickback offenses. Mr. Glover was sen-

tenced to 84 months' incarceration based on the court's finding of an offense level of 28 and a guideline range of 78 to 97 months. Had the money laundering offenses been grouped with the kickback offenses, the total offense level would have been 26, resulting in a guideline range of 63 to 78 months. Mr. Glover asserted that, due to his counsel's deficient performance, his sentence was incorrectly extended by at least 6 months and possibly up to 21 months. (J.A. 40-41).

The federal district court dismissed petitioner's Section 2255 motion. The district court noted that "[t]he government apparently concedes that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback, and money laundering offenses." (J.A. 44). The district court found it unnecessary, however, to consider whether counsel's performance was deficient under the first prong of the two-part test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). (J.A. 45). The court instead ruled that Glover failed to demonstrate the requisite prejudice under the second prong of the *Strickland* test. The district judge noted that Seventh Circuit precedent required that "[w]hen, as here, the constitutional basis for relief on such a claim is ineffective assistance of counsel, the potential change in sentence must be a 'significant' amount in order to satisfy the prejudice prong of an ineffective assistance of counsel claim." (J.A. 45). Applying the Seventh Circuit's rulings in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996), *cert. denied*, 522 U.S. 931 (1997), the district court concluded that the Seventh Circuit had stated a *per se* rule that a change of two offense levels would not be sufficient to constitute "significant prejudice." (J.A. 46). Accordingly, the district court held that "[b]ecause the error claimed in the present case [between 6 and 21 months of additional imprisonment] did not have a significant effect on Glover's sentence, he does not state any basis for granting § 2255 relief." (J.A. 47).

The Seventh Circuit affirmed on appeal, relying on the same rationale as the lower court. The court of appeals assumed that Mr. Glover had satisfied the first prong of *Strickland* by demonstrating that counsel had performed below professional standards. (J.A. 53). The Seventh Circuit held, however, that under the test established by that court in *Durrive* and *Martin*, Mr. Glover could not demonstrate sufficient prejudice to satisfy the second prong of *Strickland*. The Seventh Circuit stated, in pertinent part:

> This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.
>
> At sentencing, the district court determined that Glover's adjusted offense level under the Sentencing Guidelines was 28 and his criminal history category was I, resulting in a sentencing range of 78 to 97 months in prison. The court selected a mid-point in the range, sentencing Glover to 84 months in prison. Glover alleges that, but for the errors of his counsel, his adjusted offense level would have been 26, resulting in a range of 63-78 months imprisonment. Thus, he argues, his sentence would have been 6 to 21 months lower than the 84-month sentence he received. Unfortunately for Glover, under *Martin* and *Durrive*, this potential decrease is not sufficiently significant to be cognizable on collateral attack.

(J.A. 53-54) (citations omitted).

SUMMARY OF THE ARGUMENT

In this case, defense counsel's ineffective assistance caused the petitioner to be incorrectly sentenced. There is no dispute that, under the controlling case law, the sentencing guidelines calculation for petitioner was incorrect and excessive. Yet, the Seventh Circuit held that 6 to 21 additional months in prison due to counsel's deficient performance relating to sentencing was not "sufficiently significant" to satisfy the prejudice prong

of the ineffective assistance of counsel standard. The lower court's ruling, and the "significant" prejudice test on which it is based, is inconsistent with this Court's well established precedent concerning the prejudice prong of *Strickland*. It also is contrary to this Court's teachings concerning the Sixth Amendment right to counsel and other Sixth Amendment protections. Further, the lower court's decision conflicts with sound policy and elemental concepts of justice.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established the standards for demonstrating ineffective assistance of counsel. The *Strickland* Court ruled that a defendant satisfies the prejudice prong of the ineffectiveness test where he shows a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Court has consistently adhered to *Strickland* and applied its specific language describing the prejudice test to all types of claims of ineffective assistance of counsel. In the numerous decisions since *Strickland*, this Court has never articulated any requirement for "significant" prejudice or otherwise mandated that a defendant meet a threshold for the magnitude of the harm suffered due to counsel's ineffectiveness.

The Seventh Circuit's "significant" prejudice requirement is derived from its interpretation of *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Seventh Circuit understood *Lockhart* as adding to the prejudice prong a requirement that the result be "fundamentally unfair or unreliable." The Seventh Circuit believed that a defendant could only show a "fundamentally unfair or unreliable" result by showing a "significant" increase in sentence caused by counsel's ineffective assistance. Yet, as this Court held last term in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), *Lockhart* is the unusual case and will ordinarily "have no effect on the prejudice inquiry under *Strickland*." In *Williams*, the Court explicitly rejected the "erroneous view" – which underlies the Seventh Circuit's "significant" prejudice test here – "that a 'mere' difference in outcome is not sufficient to establish consti-

tutionally ineffective assistance of counsel." *Id.* at 1515. Petitioner's 6 to 21 months of additional and incorrect imprisonment caused by counsel's ineffectiveness plainly demonstrates the "difference in outcome" required by *Strickland*.

The Seventh Circuit's "significant" prejudice test also conflicts with this Court's Sixth Amendment jurisprudence. This Court has held that *any* term of imprisonment, no matter how short, implicates the constitutional right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). The principles set forth in the *Argersinger* line of cases – that "no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment" – cannot be reconciled with the Seventh Circuit's view that an additional 6 to 21 months of imprisonment caused by counsel's deficient performance is not "significant." The Court also has found no requirement for a "significant" term of imprisonment in the application of the other Sixth Amendment protections afforded in criminal prosecutions, such as the right to a public trial, right to notice of the charges, right to confront witnesses, and right to compel testimony. In fact, even for the right to trial by jury where the length of imprisonment is considered, this Court has upheld the right to a jury trial in any prosecution for an offense with a term of imprisonment exceeding six months.

In adopting its "significant" prejudice requirement, the Seventh Circuit was plainly motivated in part by concerns about the burden habeas challenges place on the federal judiciary. Vindication of basic constitutional rights should not be denied, however, on the basis that the judicial procedures to enforce them are time consuming or expensive. Moreover, the Seventh Circuit's fears are overblown. Only a limited number of petitioners will be able to identify with specificity a particular guideline provision which was incorrectly calculated and make the required showing of a different outcome by a "reasonable probability."

The Seventh Circuit's refusal to correct erroneous sentences unless the period of undeserved imprisonment is "sufficiently significant" is bad policy and anathema to the rule of law. Upholding incorrect sentences thwarts the purposes of Congress in enacting the Sentencing Guidelines, by allowing disparities in sentences to flourish. Moreover, the Seventh Circuit's "significant" prejudice rule calls into question the judiciary's commitment to fairness. It offends core notions of justice and liberty for a judicial system to knowingly require an individual to serve undeserved time in prison.

ARGUMENT

I. NEITHER *STRICKLAND v. WASHINGTON* NOR ITS PROGENY PROVIDE ANY SUPPORT FOR THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE

A. The *Strickland* Court Established The Clear Rule That The Prejudice Prong Is Satisfied Where There Is A "Reasonable Probability That, But For Counsel's Unprofessional Errors, The Result Of The Proceeding Would Have Been Different"

This Court in the seminal case of *Strickland v. Washington*, *supra*, addressed the proper standards for judging a criminal defendant's contention that the Constitution requires the setting aside of his conviction or sentence because his counsel's assistance was ineffective. 466 U.S. at 671. *Strickland* involved a federal habeas petitioner who claimed that he had received ineffective assistance of counsel during his sentencing proceeding. In that case, the Court announced a rigorous two-part test to determine whether counsel's assistance was so defective that the trial "cannot be relied on as having produced a just result." *Id.* at 686. The first part of the *Strickland* test requires that a defendant "show that counsel's performance was deficient." *Id.* at 687. The second prong of *Strickland* requires that "the defendant must show that the deficient performance prejudiced the defense." *Id.*

Only the "prejudice" prong of the *Strickland* test is at issue in this case. Neither the federal district court nor the court of appeals considered the first prong of the *Strickland* test in ruling against Glover. Rather, while acknowledging that Glover's sentence was incorrect under the controlling decision of *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), the courts below concluded that petitioner could not satisfy the second prong of *Strickland*.[1] It is the lower court's interpretation of this second part of the *Strickland* test – by requiring that petitioner demonstrate a "significant" increase in his sentence to satisfy the prejudice prong and concluding that an incorrect sentence of an additional 6 to 21 months imprisonment is not "sufficiently significant" – which is before the Court in this case.[2]

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[1] It is well established that a court may consider the prejudice prong first and need not reach the deficient performance component. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697; *see also Smith v. Robbins*, 120 S. Ct 746, n.14 (2000).

[2] In opposing certiorari, the Government argued that the performance of Glover's counsel was not professionally deficient and thus Glover failed *Strickland's* first prong. United States Brief in Opposition to Petition for Writ of Certiorari, at 7-9. As petitioner demonstrated in its Reply Brief in Support of its Petition, this attack on Glover's Petition was unavailing. The federal district court and court of appeals each decided this case against Glover *solely* on the grounds that Mr. Glover could not satisfy the "significant prejudice" requirement under *Strickland's* second prong. In addition, the Government never raised the issue of the first prong of *Strickland* in the court of appeals below. It is therefore not available to the respondent in this Court. *See, e.g., Steagald v. United States*, 451 U.S. 204, 209 (1981). Moreover, Mr. Glover's original counsel's failure to bring the directly controlling authority of *Wilson*, 98 F.3d at 281, to the courts' attention plainly calls that counsel's performance into serious question. *See* Reply Brief, at 4.

The prejudice prong grew out of the *Strickland* Court's recognition that attorney errors "are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* at 693. Accordingly, the Court placed the burden on the defendant to show that the error of counsel "actually had an adverse effect on the defense." It is "not enough" for the defendant to show that the errors might have had "some conceivable effect on the outcome of the proceeding." *Id.* On the contrary, the *Strickland* Court directed that

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 694. In other words, "the court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696.

Thus, the *Strickland* Court announced a prejudice test based on whether counsel's deficient performance led to a different result. As the language of the Court's opinion makes clear, the *Strickland* Court does not require the defendant to show "significant prejudice," nor does it demand that the defendant make some threshold showing concerning the magnitude of the different results caused by counsel's deficient performance.

B. This Court Has Never Seen Fit To Deviate From This Prejudice Standard Set Out In *Strickland*

The *Strickland* Court expressly held that its two-part test for ineffectiveness should apply in federal collateral proceedings, as well as on direct appeal and in motions for a new trial. *Strickland*, 466 U.S. at 698. The Court also anticipated that this test would be applied to the "infinite variety" of attorney errors. *Id.* at 693. Following its own guidance, the Court has subsequently

employed the *Strickland* standard to evaluate all types of claims of ineffective assistance of counsel by criminal defendants.[3]

When assessing the prejudice prong of a *Strickland* claim, the Court has consistently relied on the language requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000) (applying *Strickland* to claim of ineffectiveness based on counsel's failure to file notice of appeal; quoting *Strickland* "different result" test for prejudice); *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (applying *Strickland* standard to claim of ineffectiveness based on counsel's failure to investigate and present substantial mitigating evidence during the capital sentencing proceeding; quoting "different result" test for prejudice); *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying *Strickland* standard to claim of ineffective assistance in non-capital plea context; quoting "different result" test for prejudice); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (applying *Strickland* standard to counsel's failure to file a suppression motion; quoting "different result" test for preju-

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[3] For example, the *Strickland* test has been applied to errors of counsel on appeal, *see, e.g., Smith v. Robbins*, 120 S. Ct. 746, 764 (2000); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986), as well in the noncapital plea process, *see Hill v. Lockhart*, 474 U.S. 52 (1985). In addition, every circuit court that has addressed the issue has found that *Strickland* applies to the non-capital sentencing context. *See, e.g., Arredondo v. United States*, 178 F.3d 778 (6th Cir. 1999); *United States v. Breckenridge*, 93 F.3d 132 (4th Cir. 1996); *United States v. Wheeler*, 81 F.3d 171 (9th Cir. 1996); *United States v. Kissick*, 69 F.3d 1048 (10th Cir. 1995), *cert. denied*, 519 U.S. 1138 (1997); *United States v. Seyfert*, 67 F.3d 544, 548 (5th Cir. 1995); *United States v. Hanger*, 991 F.2d 791 (4th Cir. 1993); *United States v. Ray*, 828 F.2d 399, 421 & n.25 (7th Cir. 1987); *Janvier v. United States*, 793 F.2d 449, 456 (2d Cir. 1986); *see also Mempa v. Rhay*, 389 U.S. 128 (1967) (right to effective assistance of counsel exists in non-capital sentencing context). As discussed in the next section, however, the Seventh Circuit and some other circuit courts have incorrectly applied *Strickland* in the sentencing context by misinterpreting *Lockhart v. Fretwell*, 506 U.S. at 364.

dice); *Darden v. Wainwright*, 477 U.S. 168 (1986) (applying *Strickland* standard to claim that trial counsel failed to adequately prepare the case presenting mitigating evidence; quoting "different result" test for prejudice).

The Court's recent decision in *Smith v. Robbins*, 120 S. Ct. 746 (2000), is instructive. There, Robbins filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254 attacking his conviction for second degree murder in California state court. He claimed, *inter alia*, that his appellate counsel had rendered ineffective assistance in failing to file an appeals brief, thereby waiving two meritorious arguments. Because the issue of his counsel's performance on appeal had not been addressed by the courts below, the *Robbins* Court remanded to the lower courts, stating:

> On remand, the proper standard for evaluating Robbins's claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). . . . If Robbins succeeds in [his deficient performance] showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. *See* 466 U.S. at 694 (defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

120 S. Ct. at 764. There is no mention of demonstrating "significant" prejudice or that any other showing is required to satisfy the prejudice prong of *Strickland*.[4] Furthermore, it is hard to imagine how the length of the imprisonment at issue could be

[4] The *Smith v. Robbins* opinion also makes no mention of *Lockhart* or any requirement that petitioner show that the result of the proceeding at issue was fundamentally unfair or unreliable. *See infra*, Section I.C.

relevant to determining whether petitioner would have prevailed on appeal.[5]

Moreover, the prejudice issue which the Court went on to address in *Robbins* was whether Robbins was required to show *any* actual prejudice. *Robbins*, 120 S. Ct. at 764. *Robbins* is thus typical of numerous decisions discussing *Strickland* prejudice; rather than requiring *significant* prejudice as the Seventh Circuit proposes, the principal inquiry often is whether the criminal defendant should be required to show *any* actual prejudice or whether prejudice can be presumed. *See, e.g., Roe v. Flores-Ortega*, 120 S. Ct. at 1037 (issue was "whether we require the defendant to show actual prejudice. . . or whether we instead presume prejudice"); *Penson v. Ohio*, 488 U.S. 75 (1988) (same); *United States v. Cronic*, 466 U.S. 648, 659 (1984) (same). This is a dramatically different inquiry and a far cry from the showing of "significant" actual prejudice urged by the Seventh Circuit here.

This Court has never articulated any requirement for "significant" prejudice or otherwise mandated that the defendant meet some threshold for the degree to which counsel's deficient performance injured the defendant. Rather, this Court has understood in all cases that, if there is a reasonable probability that counsel's unprofessional conduct had any harmful impact on the outcome of the proceeding, the defendant's Sixth Amendment right to counsel has been violated.

[5] In the case of such an error on appeal, the usual result is a remand to the district court for further proceedings which may or may not result in a more favorable ultimate sentence for petitioner. *See, e.g., United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000) ("The test for prejudice under *Strickland* is not whether petitioners would likely prevail upon remand, but whether we would have likely reversed and ordered a remand had the issue been raised on direct appeal.").

C. The Seventh Circuit's Reliance On *Lockhart v. Fretwell* As Support For Its "Significant" Prejudice Requirement Is Foreclosed By This Court's Decision Last Term In *Williams v. Taylor*

The Seventh Circuit announced its "significant" prejudice test in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), a case, like petitioner's, involving a claim of ineffective assistance of counsel relating to the federal sentencing guidelines determination. In formulating the test, the *Durrive* court relied heavily on its reading of this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As the ruling last term in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), made clear, that reliance was entirely misplaced.

The *Lockhart* Court considered whether defendant Fretwell could show ineffective assistance of counsel based on his attorney's failure during a capital sentencing hearing to invoke a circuit court decision that was later overturned. Fretwell contended that if counsel had made a timely objection, the trial court would have been compelled to follow then-controlling, but subsequently invalidated, Eighth Circuit law. Under the more favorable precedent, Fretwell would have been sentenced to life imprisonment rather than death. Ruling against Fretwell, the *Lockhart* Court reasoned that:

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

506 U.S. at 369-70.

Seizing on this language, the Seventh Circuit interpreted *Lockhart* as mandating an inquiry under *Strickland's* "prejudice" prong into whether the ultimate result of the proceeding at issue was "fundamentally unfair or unreliable." *Durrive*, 4 F.3d at 551. The circuit court opined that in the absence of "[g]rave

errors by judge and counsel," misapplication of the federal Sentencing Guidelines does not make the sentence "unreliable or . . . fundamentally unfair." *Id.* Without giving any precise formulation, the Seventh Circuit concluded that only an error having a "significant" impact on the defendant's sentence could be condemned as unfair or unreliable.[6] Unfortunately for Durrive and petitioner, the court considered sentencing guidelines errors of 'only' two offense levels (or between 12 to 33 additional months imprisonment for Durrive and 6 to 21 months for petitioner) insufficient to render the sentence "fundamentally unfair." *Durrive*, 4 F.3d at 551.

> An extra year in custody is significant from the defendant's perspective. But the difference between 120 months and 108 or even 98 . . . does not demonstrate that the actual sentence is "unreliable . . . or fundamentally unfair"— [it] is not . . . a "significant" difference. . . . [W]e therefore conclude that Durrive has not established "prejudice" within the meaning of *Strickland*.

Id.[7]

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[6] The Seventh Circuit borrowed the "significant" impact formulation from *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993). In *Spriggs*, the Fifth Circuit held that when considering claims of ineffectiveness at a state sentencing hearing, the federal reviewing court "must determine whether there is a reasonable probability" that absent counsel's unprofessional errors the defendant's sentence "would have been *significantly* less harsh." *Id.* at 88 (emphasis in original). The *Spriggs* opinion, however, cites no Supreme Court authority for its decision to modify the *Strickland* test. Furthermore, *Spriggs* was concerned about the broad latitude and discretion given state court judges in sentencing and the possibility that any small error might satisfy the *Strickland* test by arguably affecting the result at sentencing. This concern reflects a misunderstanding of the "reasonable probability" standard of *Strickland*, and in any event the problem is far removed from the application of the highly structured federal sentencing guidelines. *See United States v. Phillips*, 210 F.3d 345, 350-52 (5th Cir. 2000).

[7] The Seventh Circuit's erroneous interpretation of *Lockhart* as requiring a showing that counsel's incompetence rendered a proceeding "fundamentally

In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), this Court considered and definitively rejected a nearly identical interpretation of *Lockhart*. As in *Durrive* and petitioner's case, the lower court in *Williams* denied the defendant's habeas petition, even though it acknowledged a reasonable probability that counsel's incompetence at the sentencing hearing resulted in an increased sentence. *Williams v. Taylor*, 163 F.3d 860, 867-69 (4th Cir. 1998), *rev'd*, 120 S. Ct. 1495 (2000). Relying on *Lockhart*, the lower court opined that it was not enough that "the outcome would have been different but for counsel's error." *Id.* at 867. The Fourth Circuit, like the Seventh Circuit, interpreted *Lockhart* as requiring that a defendant claiming ineffective assistance of counsel show that the result was "fundamentally unfair or unreliable." *Id.* at 869.[8]

This Court granted certiorari and reversed the denial of habeas relief. The *Williams* Court made clear that *Lockhart* did not modify or supplant the simple prejudice standard set forth in *Strickland*.[9] The Court reiterated that the "correct standard" is

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unfair or unreliable" might logically be applied to all claims of ineffective assistance of counsel on direct as well as collateral review. Thus far, however, the circuit court has reserved the new test for claims of sentencing errors presented on collateral review.

[8] According to the court of appeals:

> As the *Lockhart* majority made clear, the requirement that a criminal defendant alleging prejudice show that the result of the proceeding was unfair or unreliable was the rule, not the exception.
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> * * *
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> The holding in *Lockhart* – that a criminal defendant must show that counsel's performance rendered the proceeding fundamentally unfair or unreliable to establish prejudice – is not limited to the 'unusual' case.

Williams v. Taylor, 163 F.3d at 869.

[9] Even the dissent in *Williams* concurred in this interpretation of *Lockhart*. *See Williams*, 120 S. Ct. at 1525 (Rehnquist, C.J., dissenting).

the *Strickland* requirement that the defendant show that "but for counsel's unprofessional errors, the result . . . would have been different." *Williams*, 120 S. Ct. at 1502 (quoting *Strickland*, 466 U.S. at 694).

Lockhart, the *Williams* Court explained, describes an exceedingly narrow exception to the ordinary prejudice rule. The denial of relief in *Lockhart* reflected the highly unusual facts of the case. While a competent performance by defense counsel would have led to a different result, it was for an improper reason – counsel would have been relying on a decision which was subsequently discredited and overruled. Under these extraordinary circumstances, the *Lockhart* Court had considered it "unjust to characterize the likelihood of a different outcome as *legitimate* 'prejudice.'" *Williams*, 120 S. Ct. at 1512 (emphasis added).[10]

Turning to the more usual circumstances presented by *Williams*, the Court emphasized that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Id.* at 1512. The *Williams* Court expressly adopted Justice O'Connor's concurring opinion in *Lockhart* which stressed this precise point:

> I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984). The determinative question – whether there is a reasonable probability that, but for counsel's unprofessional errors the result would have been different, *id.*, at

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[10] The Court considered counsel's failure to take advantage of a subsequently invalidated decision as most closely analogous to *Nix v. Whiteside*, 475 U.S. 157 (1986). *Williams*, 120 S. Ct. at 1512-13. The *Nix* Court refused to find prejudice in counsel's interference with the petitioner's intended perjury. *Nix*, 475 U.S. at 175-76. Much like Nix's attempt to use perjured testimony, Fretwell sought an unwarranted "windfall" since he was attempting to rely on counsel's failure to raise case law which was later invalidated. *Williams*, 120 S. Ct. at 1512.

> 694 – remains unchanged. This case, however, covers the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Williams, 120 S. Ct. at n.18 (quoting *Lockhart*, 506 U.S. at 373).[11] The Court unambiguously rejected the view that the *Strickland* prejudice test should have a magnitude threshold, chiding the lower court for "its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 120 S. Ct. at 1515.

Plainly, the Seventh Circuit's "significant prejudice" test is inconsistent with this Court's conclusion that a "'mere' difference in outcome" establishes prejudice under *Strickland*. Accordingly, the Seventh Circuit's requirement of a "significant" increase in sentence cannot survive this Court's ruling in *Williams*.

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[11] Justice O'Connor further explained in *Lockhart* that

> the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of the omission. That narrow holding, of course, precisely disposes of this case as it appeared before the Eighth Circuit.
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> * * *
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> [T]he impact of advocating a decidedly incorrect point of law, like the influence of perjured testimony, is not a proper consideration when assessing the likelihood of a result more favorable to the defendant. *Strickland*, *supra*, 466 U.S. at 695.

Lockhart, 113 S. Ct. at 845.

D. Glover's 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Plainly Constitutes The "Difference In Outcome" Required To Satisfy The *Strickland* Prejudice Test

Paul Glover plainly satisfies the prejudice standard set forth in *Strickland*. In Mr. Glover's case, the "mere difference in outcome" is 6 to 21 months of additional imprisonment. By failing to urge grouping of petitioner's money laundering offenses with his conspiracy and kickback offenses under USSG § 3D1.2, and by failing to bring the controlling decision of *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996), to the attention of the court of appeals, his counsel's deficient performance caused Mr. Glover to receive an incorrect sentence. While Mr. Glover was sentenced to a term in prison of 84 months, he would have been properly sentenced in the guideline range of 63 to 78 months had his counsel not acted below the professional minimum in connection with the sentencing guidelines. Mr. Glover can clearly show that, "but for [his] counsel's unprofessional errors, the result of the proceeding would have been different" – he would have received a sentence that was at least 6 months (and up to 21 months) shorter.

The district court and appeals court assumed that Mr. Glover could demonstrate that "but for counsel's unprofessional errors," he would have received a different sentence. The lower courts' decisions turn solely on whether this 6 to 21 month difference in sentence constitutes the "significant" prejudice required by the Seventh Circuit. Absent the requirement of a "significant" increase in sentence added by the Seventh Circuit in contravention of the teachings of this Court, the difference in Mr. Glover's sentence of 6 to 21 additional months in prison plainly satisfies the *Strickland* prejudice test. *See also Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998) (even though there was no actual effect on petitioner's sentence, the possibility in the future of an enhanced sentence under repeat offender statutes

constituted sufficient prejudice under *Strickland*); *United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994) (similar).[12]

II. THE SEVENTH CIRCUIT'S REQUIREMENT OF "SIGNIFICANT" PREJUDICE IS INCOMPATIBLE WITH THIS COURT'S MOST FUNDAMENTAL TEACHINGS REGARDING THE PROTECTIONS OF THE SIXTH AMENDMENT

A. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With *Argersinger's* Holding That Any Term Of Imprisonment Implicates The Right To Counsel

Strickland and other cases addressing ineffective assistance of counsel claims grow out of this Court's right to counsel jurisprudence. It is black letter law that the constitutional right to counsel under the Sixth Amendment is implicated by *any* term of imprisonment, no matter how short. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). The Seventh Circuit's "significant" prejudice test, which is not satisfied by 6 to 21 months additional imprisonment caused by coun-

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[12] Even under the Seventh Circuit's erroneous interpretation of *Lockhart*, it is hard to comprehend how 6 to 21 undeserved months in prison could *not* be considered "fundamentally unfair or unreliable." There is no basis for assuming that only "significant" terms of undeserved imprisonment are "fundamentally unfair or unreliable." As one judge noted:

> Nowhere does *Lockhart* suggest that a sentencing may still be described as fair and reliable when it is clear that the sentencing court has sentenced the petitioner to an excessive term, and only his attorney's ineffectiveness has prevented correction of the error either in the district court or on direct appeal. Nothing in *Lockhart* remotely suggests that only when an attorney's ineffectiveness results in a 'significantly' harsher sentence may the prejudice be recognized on collateral review.

Martin v. United States, 109 F.3d 1177, 1182-83 (7th Cir. 1996) (Rovner, J., dissenting from denial of en banc review), *cert. denied*, 522 U.S. 931 (1997).

sel's ineffective assistance, cannot be reconciled with this well-settled Supreme Court authority.

In *Argersinger*, this Court found no merit to the argument that a few months imprisonment is 'insignificant' for the purposes of a defendant's constitutional right to effective counsel. This was the precise issue before the Court in that case. There, Argersinger had been unrepresented by counsel in connection with a misdemeanor offense which had a maximum punishment of six months imprisonment. He had been convicted and sentenced to serve 90 days in prison. Argersinger challenged the conviction on the grounds that his Sixth Amendment right to counsel had been violated. In response, the State argued that a defendant had no right to counsel for trials of misdemeanors where the punishment imposed on the defendant was less than six months imprisonment.

The *Argersinger* Court unanimously reversed the conviction, holding that petitioner was entitled to counsel in any case resulting in imprisonment. The Court rejected the contention that "prosecutions for crimes punishable by imprisonment for less than six months may . . . be tried without a lawyer." 407 U.S. at 30-31. The *Argersinger* Court found no historical support for such a position. In addition, it considered such a rule to be contrary to the critical importance of the role of counsel: "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." *Id.* The right to counsel had "relevance to any criminal trial, where an accused is deprived of liberty." *Id.* at 32. Unlike the Seventh Circuit here, the Supreme Court in *Argersinger* saw no reason to differentiate based on the length of the term of imprisonment. As the Court noted, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions. . ." *Id.* (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Accordingly, the *Argersinger* Court held:

> We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial.
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> * * *
>
> [N]o person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence.

Argersinger, 407 U.S. at 37 (internal quotations and citations omitted).[13]

This Court again emphasized the special nature of imprisonment in *Scott*. *Scott* addressed a defendant who was ultimately fined and not imprisoned. The defendant argued that he was entitled to the assistance of appointed counsel because he was subject to a possible jail term of one year under the applicable statute. The *Scott* Court disagreed, while reaffirming its

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[13] *Argersinger* considered a situation in which the defendant was denied counsel, whereas petitioner here was represented by ineffective counsel. Drawing a distinction between these two cases would make a mockery of this Court's recognition that "the right to counsel is the right to the *effective assistance* of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (emphasis added). A defendant who faces the prosecutor represented by incompetent counsel is injured just as surely as a defendant who is given no counsel at all, because both defendants are unconstitutionally hindered in their efforts to present a vigorous defense. As the *Strickland* Court explained, the "Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. Accordingly, having "a person who happens to be a lawyer . . . present at trial alongside the accused . . . is not enough to satisfy the [Sixth Amendment]." *Id.*

Argersinger decision and stressing the prejudicial nature of actual imprisonment to a defendant.

> [W]e believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

Scott, 440 U.S. at 373.[14]

The Seventh Circuit test before the Court here would allow an additional term of imprisonment of 6 to 21 months because of counsel's ineffective assistance. Yet in *Argersinger* and *Scott*, this Court ruled that the Sixth Amendment would not tolerate *any* deprivation of liberty without effective counsel available to assist the defendant.[15] This Court unambiguously held that *any*

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[14] Writing for the Court, Chief Justice Rehnquist noted:

> the [*Argersinger*] Court's conclusion [was] that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. The Court in its opinion repeatedly referred to trials "where an accused is deprived of his liberty" *id.* at 32, and to "a case that actually leads to imprisonment even for a brief period," *id.* at 33. The Chief Justice in his opinion concurring in the result also observed that "any deprivation of liberty is a serious matter." Id. at 41.

Scott, 440 U.S. at 372-73 (citations omitted).

[15] The Supreme Court has confirmed the continued vitality of *Argersinger* and *Scott* on numerous occasions. *See Martinez v. Court of Appeal of California, Fourth Appellate District*, 120 S. Ct. 684, 687 (2000) (citing *Argersinger* for the proposition that "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment."); *Nichols v. United States*, 511 U.S. 738 (1994) ("We adhere to that [*Scott*] holding today" and follow the "logical consequence of the holding"); *Lassiter v. Dep't of Social*

imprisonment implicated the protections of the Sixth Amendment's right to counsel. The well established Sixth Amendment principles in *Argersinger* and *Scott* directly contradict the Seventh Circuit's "significant" prejudice test for evaluating ineffective assistance of counsel claims.

B. The Seventh Circuit's Requirement Of "Significant" Prejudice Is Inconsistent With This Court's Jurisprudence Relating To Other Sixth Amendment Rights

The Sixth Amendment provides a defendant with certain specified protections in "all criminal prosecutions." U.S. CONST., amend. VI. The defendant's right "to have the assistance of counsel for his defence" is only one of the rights guaranteed by the Sixth Amendment. *Id.* Other rights enumerated in the Sixth Amendment include the right to a public trial, right to have notice of the state's accusations, right to confrontation, right to call witnesses, and right to a jury trial. The Seventh Circuit's ruling in this case – that 6 to 21 additional months imprisonment is not sufficiently "significant" to warrant habeas relief – clashes with this Court's approach to these various rights under the Sixth Amendment.

In applying these other Sixth Amendment rights, this Court has not concerned itself with whether the magnitude of the term of imprisonment faced by the defendant was "significant." For example, defendants are entitled to the "public trial" conferred by the Sixth Amendment irrespective of the severity of the penalty imposed. *See, e.g., In re Oliver*, 333 U.S. 257 (1948) (right

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Services of Durham County, N.C., 452 U.S. 18, 25 (1981) (*Argersinger* "established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief."); *see also United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (applying *Argersinger* and *Scott* to strike conditionally suspended sentence of imprisonment).

to public trial found applicable to state proceeding even though penalty was only a 60-day sentence). The Court also has set aside a conviction of a "petty" offense punishable by imprisonment for not more than 90 days because the trial court improperly restricted the right of cross-examination guaranteed by the Sixth Amendment. *District of Columbia v. Clawans*, 300 U.S. 617 (1937). The fact that the defendant faced a "petty offense" with short terms of imprisonment was not relevant to the Court's determination of whether these Sixth Amendment rights applied. As the Court noted, "It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." *Argersinger*, 407 U.S. at 28 (quoting with approval, Junker, *The Right to Counsel in Misdemeamor Cases*, 43 WASH.L.REV. 685, 705 (1968)).[16]

The right to trial by jury is the only Sixth Amendment protection which has attached any weight to the length of the defen-

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[16] *See also Landry v. Hoepfner*, 840 F.2d 1206 (5th Cir. 1988) (en banc) ("the fact that an offense is 'petty' for these purposes does not mean that in a prosecution for it the accused is not entitled to the other constitutional protections, including those in the Sixth Amendment, afforded the criminal defendant."); *State v. Tweedy*, 209 Neb. 649, 655 (1981) ("[N]o defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of . . . the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination."); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 85 (1972) ("It is our holding that under the Fifth and Sixth Amendments of the United States Constitution a defendant in a misdemeanor case is entitled to be advised by the trial court of his rights and privileges, including the privilege against self-incrimination, right to trial by jury in all but petty crimes, right to be informed of the nature of the charge against him, right to confront witnesses against him and the right to the assistance of counsel for his defense.").

dant's possible sentence. In a series of cases, this Court concluded that the right to a jury trial is guaranteed by the Sixth Amendment for any offense where the potential punishment is imprisonment of six months or more. *See, e.g., Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).[17] This limitation on the trial by jury is grounded in the historical genesis of this right, with "petty offenses" historically tried to a judge and trial by jury historically limited to "serious" as opposed to "petty" criminal offenses. As the controlling opinion of Justice White stated in *Baldwin*, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69.

Because "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone," it is not applicable to the right to counsel which is implicated by any term of imprisonment. *Argersinger*, 407 U.S. at 29; *see also id.* at 30-31 ("While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel. . . . We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."). The right to counsel at issue in this case – like the right to public trial, right to notice, right to confrontation, and right to call witnesses in one's defense guaranteed in all criminal prosecutions – applies to any deprivation of liberty by imprisonment. Nevertheless, given the Seventh Circuit's conclusion here that up to 21 months additional impris-

[17] The Supreme Court's right to jury trial "decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

onment was not "significant,"[18] it is telling that even the right to a trial by jury – the lone Sixth Amendment right which does look to the length of the defendant's sentence – fully applies to any period of imprisonment greater than six months.

III. TO ALLOW AN INCORRECT SENTENCE OF IMPRISONMENT TO STAND IS ANATHEMA TO THE RULE OF LAW AND CANNOT BE JUSTIFIED

For any individual to be wrongfully incarcerated is repugnant to our system of laws. Imprisonment is always a terrible thing, which must inevitably entail the degradation of the human spirit. At the core of the U.S. Constitution and our judicial system lies society's efforts to ensure that no person suffers such a punishment incorrectly in any measure. Nevertheless, while acknowledging that "an extra year in custody is significant from the defendant's perspective," *Durrive*, 4 F.3d at 551, the Seventh Circuit apparently concluded that it was not worth the courts' time and attention to correct an illegal sentence caused by ineffective counsel unless the additional time in prison reached some unspecified level of "significant" increase. To the contrary, allowing any illegal sentence to stand is intolerable and cannot be justified.

A. The Seventh Circuit's Concerns About The Burden Of Reviewing Collateral Attacks On Incorrect Sentences Are Misplaced

In explaining its rationale for the "significant" prejudice requirement, the Seventh Circuit seemed especially concerned that a failure to adopt a tougher "prejudice" standard would lead to

[18] In fact, the Seventh Circuit has held that more than 40 additional months in prison does not satisfy its "significant" prejudice standard. *See, e.g., Allen v. United States*, 175 F.3d 560 (7th Cir. 1999) (42 additional months imprisonment); *United States v. Paz*, 1997 WL 158338 (N.D. Ill., March 31, 1997) (41 additional months imprisonment).

numerous such habeas petitions being filed. The Seventh Circuit opined that "[a]lmost any error at sentencing may be recast as a challenge to counsel." *Durrive*, 4 F.3d at 550. The Seventh Circuit expressed dismay that habeas petitioners might be able to attack incorrect sentences by circumventing Seventh Circuit doctrine that precluded sentencing guidelines mistakes from being raised in habeas proceedings. *Id.* at 550-51; *see also Martin*, 109 F.3d at 1178. By requiring a "significant" increase in sentence (which it equated with more than two offense levels), the Seventh Circuit intended to "save[ ] everyone the time and aggravation [these] collateral proceeding[s]" entail. *Durrive*, 4 F.3d at 552.

These types of concerns should not sway this Court in evaluating the constitutional rights asserted by Mr. Glover. As this Court has frequently noted, adherence to the Constitution is not without its costs.[19] As an obvious example, the monetary costs required to implement *Argersinger's* holding that counsel must be afforded to indigents in misdemeanor cases were not insubstantial. *Argersinger*, 407 U.S. at 2012 & n.7 (estimating implementation will require at least 1,575 additional fulltime lawyers to represent indigent misdemeanants). This Court also has recognized that there are societal costs associated with enforcing the Fourth Amendment's rights against unreasonable search and seizure, in that guilty criminals sometimes will go free. *See Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000). Addressing habeas petitions filed by prisoners is simply another one of the burdens of our Constitution and system of laws.

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[19] As this Court noted in *Fuentes v. Shevin*, 407 U.S. 67 (1972):

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy. . ."

Id. at 90 n.22 (quoting *Stanley v. Illinois*, 405 U.S. 645, 650 (1972)).

Moreover, the Seventh Circuit's concerns about a surfeit of Section 2255 motions seem overblown. It is not true that any sentencing error can be "recast" as an ineffective assistance of counsel claim. Counsel frequently will have acted in a professionally competent manner in the sentencing process, having made all the necessary objections and arguments. While the prisoner may have strong arguments that the trial and/or appeals judges erred in interpreting the sentencing guidelines in these cases, the arguments cannot be translated into challenges to counsel's effectiveness. Contrary to the Seventh Circuit's fears, the ineffectiveness of counsel claim is not infinitely mutable and is not applicable to a substantial number of cases.[20]

The Seventh Circuit also ignores the important qualification in *Strickland*'s statement of the prejudice standard that a defendant must show a "reasonable probability" that counsel's unprofessional errors caused the result to be different. *Strickland*, 466 U.S. at 693-95. The Seventh Circuit seems to assume that habeas petitioners will be able to easily overcome the "reasonable probability" hurdle. We believe such an assumption to be unwarranted. While the Seventh Circuit is correct that "almost any of counsel's actions has a potential effect on a sentence," *Durrive*, 4 F.3d at 550, this is not the standard. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995). As the *Strickland* Court stated, "It is not enough for the defendant to show that the errors

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[20] Moreover, the premise of the Seventh Circuit's concern is that habeas petitioners will use the right to counsel as a means of circumventing that circuit's prohibition on review of sentencing guidelines issues in Section 2255 petitions. *See Scott v. United States*, 997 F.2d 340, 342-43 (7th Cir. 1993). This Court, however, has never reviewed the correctness of this underlying premise, which is of questionable validity since any sentence outside the properly computed guideline range is (absent lawful departures) an illegal sentence under 18 U.S.C. §§ 3551(a) & 3553(b) and thus can be corrected under 28 U.S.C. § 2255, as the plain language of that provision states.

had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Petitioners will need to adduce specific facts and cite to relevant law to convince a court that there was a "reasonable probability" of success. Only a relatively small number of petitioners will be able to come remotely close to satisfying this standard.[21]

In addition, the nature of the Sentencing Guidelines themselves will limit the number of petitions and the time required by the courts to review these petitions. The Guidelines operate by listing a number of offense and offender characteristics and calculating a defendant's sentence based on these characteristics.[22] As a result, sentencing under the Guidelines is a highly structured, formulaic process. *See* Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) ("Through commentary and specific guideline provisions, the Commission offers objective criteria to guide the exercise of structured discretion by the judge."); *see also United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) ("The Sentencing Guidelines brought a formulaic method to sentencing . . ."). [23]

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[21] *See, e.g., Strickler v. Greene*, 527 U.S. 263, 296 (1999) (although the petitioner adequately demonstrated that the prosecution failed to disclose exculpatory evidence, petitioner failed to show that there was a "reasonable probability that his conviction or sentence would have been different had these materials been disclosed"); *Cade v. Haley*, No. 99-6052, 2000 WL 1166023, at *3 (11th Cir. Aug. 17, 2000) (despite presenting testimony by three mental health experts and five community acquaintances, petitioner failed to show a reasonable probability of a different result).

[22] The highly structured and specific nature of the Sentencing Guidelines is in marked contrast with the "wide sentencing discretion" of the Texas' sentencing scheme which led *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993), to adopt the "significant" prejudice requirement. Given the concreteness and specificity of the Sentencing Guidelines, there is none of the unfettered discretion that led the *Spriggs* court to worry that *Strickland* would become an "automatic rule of reversal." *Id.*

[23] "There is very little discretion for a sentencing court within the sentencing guidelines. Most all complaints regarding sentencing guidelines calculations involve specific determinations resulting in 'demonstrable enhancements.'" Brief of United States to U.S. Court of Appeals for the Seventh Circuit, Glover v. United States (February 23, 1999), at 17.

Consequently, a petitioner seeking habeas relief must identify a particular part of the guideline calculation in his case which was adversely affected by his counsel's ineffective assistance. In this case, Mr. Glover was able to point to his counsel's unprofessional error relating to the grouping of money laundering offenses with kickback offenses under Section 3D1.2 of the Sentencing Guidelines. Few petitioners will be able to identify this type of specific, detailed guidelines error. Moreover, because of the requisite specificity of the guidelines error which must be identified in a petition, a reviewing court will be able to focus on the precise issue and quickly resolve the petition.[24]

B. Allowing Illegal Sentences To Stand Would Defeat The Purpose Of The Sentencing Guidelines And Lead To Disrespect For The Rule Of Law

More importantly, petitioner believes that it is the Seventh Circuit's approach – establishing an especially tough "prejudice" test for habeas review of ineffective assistance of counsel claims relating to sentencing guidelines errors – which is poor policy. The benefits inherent in reviewing the habeas petitions of Glover and others where counsel's errors caused incorrect sentences under the guidelines far outweigh the costs in judicial "time and aggravation" cited by the *Durrive* Court. One important benefit of such a collateral review is to promote the uniformity of sentences. A chief goal of the Sentencing Guidelines was to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ." 28 U.S.C. § 991(b) (2000); *see*

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[24] Contrary to the Seventh Circuit's concerns, numerous cases also could be quickly and easily resolved based on the "deficient performance" prong of *Strickland*.

also 18 U.S.C. § 3553 (2000) ("Sentencing Reform Act of 1984 attempts to promote sentencing uniformity . . ."); *Koon v. United States*, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities . . . [and to] provide uniformity, predictability and a degree of detachment lacking in our earlier system.").[25] This goal of uniformity in sentences will be defeated if courts do not correct mistaken sentences caused by unprofessional counsel. Mr. Glover received a sentence which is outside the range established by the guidelines for individuals with similar criminal backgrounds and offenses. Under the Seventh Circuit's rule, some defendants would serve prison sentences which are many years longer than their comparable 'peers' who committed the same offenses.[26] In implementing the sentencing guidelines, courts have not been permitted to adopt sentencing practices

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[25] *See also United States v. Banuelos-Rodriguez*, No. 96-50297, U.S. LEXIS 13691 (9th Cir., June 14, 2000) (The Guidelines "sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* at *12.); *United States v. Fayette*, 895 F.2d 1375, 1381 (11th Cir. 1990) ("The Guidelines were promulgated to rationalize the sentencing process by . . . promoting 'uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.'"); Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1998) (A key Congressional purpose in enacting sentencing guidelines "was to reduce 'unjustifiably wide' sentencing disparities.").

[26] The Seventh Circuit's test leads to extreme disparities in sentences. The Seventh Circuit has concluded that an error of two or three offense levels is not "significant prejudice." *See Durrive*, 4 F.3d at 551; *Martin*, 109 F.3d at 1178; *Gil v. United States*, 4 F. Supp. 2d 760, 769 (N.D. Ill. 1998). But, in some cases, two or three offense levels can mean 89 to 112 months of additional time in prison. *See Martin*, 109 F.3d at 1183 (Rovner, J., dissenting from denial of *en banc* petition). Thus, the sentencing disparities for comparable defendants may reach eight or nine years.

which thwart Congress' intent of promoting uniformity in sentences,[27] and the same should be true here.[28]

Congress recognized that disparities in sentences corrodes public confidence in the federal judicial system.[29] Yet, even more damaging to public's respect for the legal system is the continued imprisonment of individuals beyond their correct sen-

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[27] *See Koon v. United States*, 518 U.S. 81, 98 (1996) ("Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline."); *United States v. Jackson*, 921 F.2d 985, 989 (10th Cir. 1990) ("Because Congress set uniformity and proportionality as goals, a sentencing judge should depart from the Guidelines range only when necessary. . .").

[28] The Seventh Circuit also increases the likelihood of disparate and arbitrary results because of the difficulties in determining what constitutes a "significant prejudice:" It should not be surprising that the lower courts' application of the Seventh Circuit's "significant" prejudice rule has been inconsistent. *Compare, e.g., Allen v. United States*, 175 F.3d 560 (7th Cir. 1999) (42 additional months in prison; not "significant" prejudice); *United States v. Paz*, 1997 WL 158338 (N.D. Ill. March 31, 1997) (41 additional months in prison; not "significant" prejudice); *with United States v. Tai*, 972 F. Supp. 434 (N.D. Ill. 1997) (15 to 42 additional months in prison; "significant" prejudice found) ("An increase of more than 15 months in the length of a prisoner's sentence seems 'significant' to us." *Id.* at 437-38); *United States v. Hubbard*, 1997 WL 639232 (N.D. Ill. Oct. 6, 1997) (40 additional months in prison; "significant" prejudice found). As Judge Rovner wrote:

> I cannot help but believe that in the adoption of this "significant" test, we have transformed ourselves into a kind of feudal duchy, with the power to grant or deny a reprieve to wrongfully sentenced prisoners according to our own whim. This is repugnant not only to our office as appellate judges but to the Guidelines themselves, which after all were adopted to achieve greater consistency in sentencing among similar situated defendants.

Martin, 109 F.3d at 1184.

[29] "Unjustifiably high or low sentences are unfair to offenders and the public in subtle ways as well. Sentences that are disproportionate to the seriousness of the offense, whether they are too high or low, create a disrespect for the law." S. Rep. No. 96-553 (1980).

tence. "[J]ustice consists not only of convicting the guilty, but also of assigning them a lawful and just punishment." *United States v. Tayman*, 885 F. Supp. 832, 844 (E.D. Va. 1995). The judicial system has a legal and moral obligation to ensure that imprisonment is fair and to correct its mistakes when they come to its attention. Having defendants serve prison sentences longer than the period called for by the applicable statutes and regulations because of counsel's error is anathema to the rule of law. As one court noted in a different context:

> [S]entencing a defendant at the wrong guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings. If we do not correct this error, [defendant] will serve a term of imprisonment [] longer than required by the sentencing guidelines. We cannot casually ignore this fact . . . No court of justice would require a man to serve [] undeserved years in prison when it knows that the sentence is improper.

United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996), *cert. denied*, 519 U.S. 1999 (1996). Similarly, "fairness, integrity and public reputation of the judicial proceedings" should compel this Court to reject the "significant" prejudice test adopted by the Seventh Circuit below and to conclude that Mr. Glover's 6 to 21 months of additional imprisonment caused by counsel's unprofessional errors satisfies the prejudice prong of *Strickland*.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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